

# Transitional Justice and North Korea: The Question of Amnesty for North Korean Officials

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One of the many issues following governmental collapse and transition in any country is that of the former officials. The twentieth and twenty-first centuries have seen many governmental transitions; approaches regarding former officials have varied considerably, as have their outcomes. Naturally, pre-transitional characteristics and the characteristics of governmental collapse greatly affect these outcomes; however, transitional judicial action against former high-level officials has been successful in many transitions. Would such an approach be applicable in the event of Korean reunification, and how would it best be implemented with the objective of ending human rights violations in North Korea and facilitating an effective transition to South Korean leadership?

## **Defining Democratic Transition**

Democratic transition must take place before the pursuit of transitional justice can begin. Scholars have varying interpretations of what exactly constitutes true democratic transition. Guillermo O'Donnell and Philippe Schmitter define such a shift as taking place in the interval between the fall of an authoritarian regime and the institution of some form of democracy.<sup>1</sup> Scott Mainwaring expands on that definition, outlining three necessary characteristics of a post-authoritarian democratic government. First, competitive popular elections, free of manipulation, must be the primary avenue to political power. Second, broad adult citizenship must be recognized by the government. Finally,

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<sup>1</sup> Scott Mainwaring, "Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues," Working Paper #130, Kellogg Institute for International Studies, November 1989, accessed August 4, 2012, <http://kellogg.nd.edu/publications/workingpapers/WPS/130.pdf> citing Guillermo O'Donnell, Philippe Schmitter and Laurence Whitehead, eds. 1986. *Transitions from Authoritarian Rule: Prospects for Democracy*. Baltimore: Johns Hopkins University Press.

the government must guarantee essential civil liberties (and human rights) to all citizens, as well as protect the rights of minorities.<sup>2</sup>

O'Donnell and Schmitter differentiate between democracy and consolidated democracy, noting that consolidated democracy follows the installation of democracy in a successful transition. Mainwaring builds upon this assertion, contrasting “democratic governments” and “democratic regimes”.<sup>3</sup> Regimes are not necessarily confined by the regulations followed and upheld by democratic governments. These regulations take constitutional form—for example, the United States constitution limits presidents to two terms. Leaders of democratic regimes find ways to amend such regulations, if they exist in his or her state to begin with, and enable themselves to stay in power, or widen their authority.<sup>4</sup> Prominent examples of democratic regimes are the Philippines under Ferdinand Marcos and the Republic of Korea (ROK, or South Korea) under Park Chung-hee and Chun Doo-hwan. In the case of the latter, transition from democratic regime to democratic government came about as a result of widespread civilian protests in favor of direct presidential election and an end to harboring, torture and killing of political prisoners.

### Responding to Past Abuses

In the process of transition, or following its successful completion, a wide range of options are available in response to past human rights violations, both in substance and in execution, to those managing transition. Each has advantages and disadvantages, and some are more feasible than others, particularly in domestically-managed transitions with limited resources. Brian K. Grodsky condenses the transitional judicial responses to past human rights abuses taken by a multitude of states in his book, *The Costs of Justice*, into seven general approaches, which are as follows: cessation and codification of human rights violations, rebuke of the old system, rehabilitation and compensation for victims, creation of a truth commission, purging human rights abusers from public function, criminal prosecution of “executors” (those lower on the chain-of-command) and criminal prosecution of commanders (those higher on the chain-of-command). They are classified on a spectrum of harshness, with cessation and codification being the most lenient and criminal prosecution of commanders being the most harsh.<sup>5</sup>

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<sup>2</sup> Ibid.

<sup>3</sup> Mainwaring, “Transitions to Democracy” citing O'Donnell, Guillermo, Philippe Schmitter, and Laurence Whitehead, eds. 1986. *Transitions from Authoritarian Rule: Prospects for Democracy*. Baltimore: Johns Hopkins University Press.

<sup>4</sup> Mainwaring, “Transitions to Democracy.”

<sup>5</sup> Brian K. Grodsky, *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses* (Notre Dame: University of Notre Dame Press, 2010), 38.

The fifth, sixth and seventh approaches listed involve transitional justice, as action is taken against former leaders as part of those approaches. Large groups of lower-level officials, higher-level officials or both can face trial after transition, as was the case in Japan. Alternatively, only certain lower- or higher-level officials (such as those believed to have exhibited unusual cruelty in their duties, in the case of the former, or those directly responsible for policies which caused abuses, in the case of the latter) can face action. Additionally, guilty verdicts in transitional judicial proceedings do not necessitate sentencing—guilty verdicts can serve to condemn and codify past violations while avoiding the increased risk of retribution associated with punishment of officials.<sup>6</sup>

Grodsky writes that those identifying with the “purist” school in international law advocate prosecution of all former officials responsible for or having engaged in human rights violations.<sup>7</sup> However, due to the sheer number of violators and the difficulties a new government would face bringing them all to trial, such an approach is virtually impossible. Additionally, past attempts to punish vast sums of violators have caused many problems. Therefore, approaches more in line with the “pragmatist” school referenced by Grodsky, which involve selective justice and selective amnesty, are both more feasible and more effective in facilitating transition.<sup>8</sup>

For purposes of clarity, the term “selective justice” in this essay refers to transitional judicial action against certain former officials who engaged in human rights abuses, or small groups thereof, with the objectives of ending human rights violations, preventing future violations and ensuring successful democratic transition, within the boundaries of feasibility imposed by limited resources and legal mechanisms. Pursuit of selective justice in a post-transitional society necessitates amnesty for many former perpetrators because not all of them can (or should) be tried. While formally granted amnesties greatly lessen the potential for resistance to transition among former officials, they risk public disapproval because they specifically allow violations to go unpunished. De facto amnesties result from lack of judicial action against violators. Such an approach leaves open the possibility of judicial action against former officials, risking their retribution, while still allowing almost all violators to remain unpunished.<sup>9</sup> “Selective amnesty” refers to explicitly granted amnesty for former officials, with the purpose of ensuring successful transition and avoiding unpractical requirements of existing resources and legal structures.

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<sup>6</sup> Ibid., 13-57.

<sup>7</sup> Ibid., 16.

<sup>8</sup> Ibid., 16-17.

<sup>9</sup> Ibid., 13-58.

In any transitional judicial process, application of selective justice, and likewise selective amnesty, necessitates careful consideration. Action against “executors” is beneficial in that it curtails violations through exemplifying individual responsibility for abuses—police officers carrying out arbitrary arrests are not exempt from punishment because they were simply “carrying out orders.”<sup>10</sup> Furthermore, such action often seems necessary—violent lower-level officials have no place in government, no matter who is in charge. Grodsky, however, writes that any significant legal response to abusive “executors” must be systematic.

One or two criminal prosecutions of low-level perpetrators or twenty investigations of a 10,000- person administrative unit—where far more people are known to have been involved in rights abuses—are insufficient.<sup>11</sup>

Such systematic action may be unfeasible due to limited resources or qualified judicial personnel, or destabilizing to the transitional government or society. For purposes of clarity, judicial action against lower-level officials will only be classified as such if it is systematic—trial of a handful of officials will be considered in case study analysis, but not as “criminal prosecution of ‘executors,’” as defined by Grodsky.

Judicial action can alternatively be pursued against commanders, those who hold responsibility for the policies or systems which permitted or encouraged rights violations. Such an approach is advantageous in that it seeks to punish those officials, or label their actions as unacceptable, deters future leaders from engaging in similar abuses, and further legitimizes international statutes on human rights. Furthermore, governments naturally have a much smaller number of commanders than executors, and often only one or a few are responsible for the mechanisms which violate the rights of their people. Accordingly, only one higher-level official need be tried for this approach to be effective. Therefore, judicial action against commanders will be classified as such even if legal action was taken against only one higher-level official in a case study.

The pitfalls of action against commanders largely involve difficulty bringing them to trial, particularly if they retain considerable influence. Trial of higher-level officials often worries other former leaders, who may remain influential, and make them resistant to transition.<sup>12</sup> Therefore, explicitly-granted amnesty must be considered to lessen elite fear of retribution in the face of legal action against former leaders.

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<sup>10</sup> Ibid., 52.

<sup>11</sup> Ibid., 87.

<sup>12</sup> Ibid., 54.

## Legal Institutions and Selective Justice

International tribunals, such as those conducted by the International Criminal Court (ICC), often pursue selective justice with the same objectives as those defined above.<sup>13</sup> Indeed, international tribunals are a prominent transitional judicial option as they hold oppressive leaders to international human rights standards in countries that are unable or unwilling to do so. Tribunals, however, are often inefficient and time-consuming, sometimes lasting for decades. They also threaten harsher punishment for ousted leaders than they may face if dealt with by domestic systems, which makes those leaders more adverse to transition.

In addition, debate over international law and punishments for violations, as well as the role of the ICC, continues, which compromises international support for tribunal verdicts. Many international players object to international tribunals on other grounds—the US’ refusal to recognize the ICC is evidence of such.<sup>14</sup> Additionally, leaders of many nations are, logically, reluctant to support the establishment of legal precedents that could one day be applied to them.<sup>15</sup> China, for example, has objected to components of Article 5 of the Rome Statute, which can be invoked to prosecute leaders responsible for the killing of nationals.<sup>16 17</sup>

The alternative to tribunals is domestic action, which enables leaders and citizens formerly affected by human rights abuses to approach transitional justice in a national context. Punishments dictated by domestic legal systems are usually more lenient than those resulting from tribunals, often involving broad amnesty. Therefore, support among leaders for transition is stronger when domestic trials are employed. Such trials are often limited, however, by lack of resources and unbiased judges educated in international law.<sup>18</sup> Hybrid approaches, which combine international and domestic judiciaries, often have problems associated with both tribunals and domestic trials. This has been the

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<sup>13</sup> Sara Darehshori and Elizabeth Evenson, “Peace, Justice and the International Criminal Court,” Research Article 1, Oxford Transitional Justice Research, March 19, 2010, accessed August 13, 2012, <http://www.csls.ox.ac.uk/documents/DarehshoriandEvenson2010.pdf>.

<sup>14</sup> “Overview of the United States Opposition to the International Criminal Court,” *ICC Now*, accessed August 13, 2012, [http://www.iccnw.org/documents/CICCFUS\\_Opposition\\_to\\_ICC\\_11Dec06\\_final.pdf](http://www.iccnw.org/documents/CICCFUS_Opposition_to_ICC_11Dec06_final.pdf).

<sup>15</sup> Bing Bing Jia, “China and the International Criminal Court: Current Situation,” 2006 *Singapore Yearbook of International Law and Contributors* (2006), accessed August 13, 2012, [http://law.nus.edu.sg/sybil/downloads/current/Jia\\_SYBIL\\_2006.pdf](http://law.nus.edu.sg/sybil/downloads/current/Jia_SYBIL_2006.pdf).

<sup>16</sup> Bing Bing Jia, “China and the ICC.”

<sup>17</sup> “Rome Statute of the International Criminal Court,” *United Nations* (1998), accessed August 13, 2012, <http://untreaty.un.org/cod/icc/statute/rome.htm>.

<sup>18</sup> Priscilla Hayner, *Unspeakable Truths* (New York: Routledge, 2001), 12.

case in Cambodia, where several former Khmer Rouge officials are on trial for human rights violations during their rule in the 1970s and '80s. Many have died before their scheduled trials, and the effectiveness of any action by the tribunal has been considerably lessened due to the amount of time that has passed since the Khmer Rouge fell from power. Additionally, more than half of the presiding judicial officials are Cambodian, with ties to, or favorable views of, the Khmer Rouge, making justice less likely.<sup>19</sup>

## Case Studies

In order to better predict the most effective approach for Korea and the international community in the objectives of democratic transition and cessation of human rights violations north of the present De-Militarized Zone (DMZ), similar states, which have addressed the issue of transition and transitional justice in the past, require study. Examination of several cases, involving either societies with pre-transition characteristics similar to those of present-day North Korea, or societies which addressed transitional and judicial issues likely to be factors in North Korean transition, follows. Analysis of these studies is beneficial in that it highlights approaches that have brought success in past transitions, particularly in cases similar to North Korea. It must be noted that North Korea is unique, and its society has many characteristics not present in any other case studies. This is true for any country; due to cultural differences and separate historical transitional contexts, approaches taken in one case do not always work in others.

In addition to a brief synopsis of the initial issues and subsequent transitional justice approaches taken in each case, each transition will be labeled successful or unsuccessful based on Mainwaring's guidelines: in democratic societies, free elections will be the primary selective process for governmental leaders, broad citizenship will be granted and civil liberties will be protected.

## South Korea

Today a dramatic contrast to the North in almost every aspect, South Korea, as noted in the introduction, has a great deal in common with North Korea. For centuries before their division, the two shared a common history, including the hardship of Japanese colonization. Their post-division histories are similar through 1987—until then, both struggled with poverty and autocratic regimes which had little, if any, respect for human rights.<sup>20</sup> Following a

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<sup>19</sup> Elisa Hoven, comp., "The Khmer Rouge Tribunal—Cambodia's Search for Justice," CSEAS Speaker Series, University of Hawaii (2010), <http://scholarspace/manoa.hawaii.edu/handle/10125/15288>.

<sup>20</sup> Bruce Cumings, *Korea's Place In The Sun* (New York: W.W. Norton & Company, 1997).

short-lived attempt at democratic transition in the early 1960s, South Korea successfully democratized in the 1980s, became a regional power and then rose to the world stage. Though all early South Korean presidents violated the rights of South Koreans, only the second transition attempt focused on holding these men accountable for those abuses.

South Korea's first president was Syngman Rhee, an authoritarian anti-communist leader who violated human rights on several occasions, notably presiding over the shooting of protestors following severely rigged presidential elections favoring Rhee's designee.<sup>21</sup> A public uprising resulted from this atrocity, forcing him from power and giving way to a renewed democracy, led by prime minister Myon Chang, which vested most power with the parliament. In reaction to Rhee's leadership, the new governmental structure greatly limited the potential for future presidential abuse of power; however, this change, destabilized and weakened the government.<sup>22</sup>

More backlash against the Rhee regime followed—a series of governmental purges was carried out by the new leaders as a result of popular pressure. Forty thousand former government officials and police officers were investigated under suspicion of complicity in anti-democratic activities or corruption. Of these, more than 2,200 government officials and 4,000 police officers were purged.<sup>23</sup>

These purges angered those affected and caused further political and social destabilization.<sup>24</sup> The strength of the police force was greatly lessened, along with the effectiveness of the government. Major General Park Chung-hee, heading military and popular factions opposed to the weakness of the Chang government and fearing its collapse into communism, led a coup on May 16, 1961.<sup>25</sup> The police force was far from capable of protecting the government and keeping order. Park was able to generate incredible support for the military coup, even among military police officers sent to arrest those partaking in the coup, as a result of the perceived weakness and corruption of the Chang government.<sup>26</sup> Within twenty-four hours, Park and the military leadership had assumed control of the entire South Korean government.<sup>27</sup> Though Park initially enjoyed democratic support, he followed a trajectory similar to that of Syngman Rhee, evolving into a tyrannical dictator who showed no respect

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<sup>21</sup> Cumings, *Korea's Place*, 344.

<sup>22</sup> Ibid., 346.

<sup>23</sup> Andrew C. Nahm, *Korea: Tradition & Transformation* (Elizabeth: Hollym International Corp, 1988), 441.

<sup>24</sup> Ibid.

<sup>25</sup> Cumings, *Korea's Place*, 347.

<sup>26</sup> Byung-Kook Kim and Ezra F. Vogel, eds, *The Park Chung Hee Era: The Transformation of South Korea* (Cambridge: Harvard University Press, 2011), 50.

<sup>27</sup> Cumings, *Korea's Place*, 348.

for the rights of the South Korean people.

Following decades of oppressive rule under Park Chung-hee and, later, Chun Doo-hwan, the South Korean populace installed the Sixth Republic by forcing Chun Doo-hwan to hold elections, in which Roh Tae-woo triumphed.<sup>28</sup> Roh was a veteran Korean politician; he had held a prominent position in the oppressive Chun government, which engaged in heavy censorship and often killed protestors.<sup>29</sup> Roh proclaimed himself the face of a new South Korean democracy and blamed Chun alone for the killing of students protesting the anti-democratic government on December 12, 1979, though he had also been involved in the response.<sup>30</sup> One senior official, Chang Se-dong, then head of South Korean intelligence, was sent to prison for involvement in the killing of protestors, but the Roh government did not punish any others.<sup>31</sup>

Kim Yong-sam was elected president in 1993, and his government addressed past human rights abuses more directly. Action was taken against Roh and Chun; they were given lengthy prison sentences following trials and convictions by the democratic government and South Korean citizens. No lower-level officials were prosecuted. Roh and Chun were pardoned after only a few years in prison, but a human rights precedent had been established.<sup>32</sup>

The purge enacted by the Chang government in response to human rights violations under Syngman Rhee was an unsuccessful approach in that it failed to ensure such violations were not repeated. It served to further weaken the government and led to its rapid overthrow by Park Chung-hee. Furthermore, the Chang government's response to human rights violations was limited to the purge of lower-level officials—no action was taken against Rhee himself.

The Sixth Republic government's response to violations committed during the Chun regime, however, was much more effective. Action was limited to top officials complicit in human rights abuses. In addition, these trials had no role in the outcome of the transition. Though a significant step on South Korea's part, the trials were an afterthought in the context of the transition.<sup>33</sup>

## Japan

The division of Korea which brought about the Korean War and led to the separate fates of the two nations began with imperial Japan's exit from the

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<sup>28</sup> Ibid., 389.

<sup>29</sup> Ibid., 342-403.

<sup>30</sup> Ibid., 390.

<sup>31</sup> Kuk Cho, "Transitional Justice in Korea: Coping with Past Wrongs after Democratization," *Pacific Rim Law & Policy Journal* 16, no. 3 (2007): 580-611, <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/582/16PacRimLPolyJ579.pdf?sequence=1>.

<sup>32</sup> Cho, "Transitional Justice in Korea."

<sup>33</sup> Ibid.



Korean Peninsula at the end of World War II. Though Japan and Korea had very different roles in early-twentieth century Asia, important parallels with imperial Japanese society exist today in North Korea.

Following Japanese surrender was the American-led Allied Occupation of Japan. General Douglas MacArthur, the US occupying force and the international community faced the incredible challenge of transforming a highly militant society, which worshiped and followed an Emperor, into a peaceful democracy, while responding to Japan's human rights violations. MacArthur risked harsh retribution from the Japanese people and occupational failure if he pursued judicial action against Emperor Hirohito, but Hirohito had overseen numerous grave human rights violations which required attention. Though he had not engaged in systematic abuses of domestic human rights in the normal sense of the term, he sent millions of Japanese to war with unconditional orders to defeat the enemy or die trying.<sup>34</sup> Treatment of those in territories occupied by the Japanese military, however, was atrocious.<sup>35</sup>

Like Kim Il-sung and his successors, the Japanese Emperor portrayed himself as a divine being and elicited absolute obedience from his subjects. However, though the Emperor was by far the most powerful man in the Japanese government, high-level military officials made many of the operational decisions regarding the war<sup>36</sup>; therefore Emperor Hirohito was not fully to blame for many of the human rights abuses conducted by the Japanese military (though he did oversee and permit them).

One of the most striking policy decisions of the American brass was to grant Emperor Hirohito amnesty, exempting him from their war crimes tribunal which tried, convicted and executed many other Japanese officials following the surrender. Hirohito was also retained as Emperor, albeit with very little power, to serve as a unifying figure for post-war Japan. However, a purge was imposed on many higher-level Japanese government officials, lasting until the end of the US occupation.<sup>37</sup> Most lower- and mid-level officials were not purged.<sup>38</sup>

The decision to grant Hirohito amnesty was highly unpopular in America and elsewhere. MacArthur, however, emphasized that the decision was made in an effort to avoid further antagonizing the Japanese—he feared the citizens would rebel openly if the occupying powers moved to put Hirohito on trial.<sup>39</sup>

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<sup>34</sup> Eiji Takemae, *Inside GHQ: The Allied Occupation of Japan and its Legacy*, Trans. Robert Ricketts (New York: Continuum, 2002), xxviii.

<sup>35</sup> Ibid., xxxviii.

<sup>36</sup> Ibid., xxxv.

<sup>37</sup> Ibid., 268-70.

<sup>38</sup> Ibid., 270.

<sup>39</sup> Takemae, *Inside GHQ*, 268-70.

Rebellion would have possibly led to renewed armed conflict, which nobody wanted; moreover, mass opposition, of any sort, to Allied efforts would quickly undermine and jeopardize the transition, as well as reconstruction. MacArthur and others also recognized the importance of Hirohito's support and cooperation with the transition.<sup>40</sup>

The allied approach, though emphasizing the need for stability and support in the objective of transition, was quite different from that of South Korea. The head of state was granted amnesty and retained, though with sharply limited powers, while many military officials beneath him were sent to war crimes tribunals and executed, and other members of the government were purged. However, this approach proved incredibly successful—only a few years after the war ended, the powers left a completely democratic Japan with a new constitution, signed and supported by the Japanese, which renounced their ability to make war except in self-defense. The purge was also lifted and Japan evolved to become the world economic power it is today, and both its democracy and stability remain strongly intact.<sup>41</sup>

It must be noted that the extensive transitional justice approach taken by the allies in Japan, involving prosecution of higher- and lower-level officials as well as a purge, took place in an exceptional international political environment brought on by the conclusion of World War II. Such an approach would be virtually impossible to effectively duplicate in North Korea due to the nature of the political climate and the resources needed, though individual elements of the approach are applicable.

## Philippines

Like Korea and much of Asia, the history of the Philippine nation is characterized by imperialism. First the Spanish, then the Americans and finally the Japanese occupied the Philippine islands and following independence in 1946, the nation struggled to preserve democracy, which was especially weakened by Ferdinand Marcos, who rose to power after independence. Following Marcos' demise in 1986, Filipino leaders experimented with various transitional justice approaches in attempts to maintain governmental legitimacy while re-establishing democracy.

While Marcos was technically kept in power democratically, he was an authoritarian leader sustained by the military and his own manipulative actions.<sup>42</sup> The larger political atmosphere in the Philippines which permitted Marcos' abuses was characterized by the all-too-common narrative of military

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<sup>40</sup> Ibid., 259.

<sup>41</sup> Ibid.,

<sup>42</sup> Thompson, Mark R, *The Anti-Marcos Struggle* (New Haven: Yale University Press, 1995), 70.

governmental control.<sup>43</sup> Following his downfall, civilian leader Corazon Aquino took power from the military and attempted to purge leaders involved in the Marcos government.<sup>44</sup> This had mixed results. As governors and mayors fought to keep their positions, critics began casting her actions as non-democratic, even more so than some of the policies of her predecessor.<sup>45</sup> Her cabinet, divided between civilian and anti-Marcos military officials, became wrought with tension while the government became increasingly unstable.

Aquino also limited the power of the military significantly, and soon military officials opposed to her policies joined with other military factions, including those still loyal to Marcos, in efforts to force her from power. Seven coup attempts were carried out against the Aquino government between 1986 and 1989, though all were unsuccessful. The military factions opposed to Aquino were further weakened after the final major coup attempt as leaders were arrested.

Despite this turmoil, Aquino managed to enact some democratic reforms, and elections were held in 1992. Fidel Ramos, Aquino's defense minister, was elected and power was peacefully transferred.<sup>46</sup> In order to consolidate power and continue stabilizing the government, Ramos granted remaining rebel military leaders amnesty in exchange for their surrender following his electoral victory.<sup>47</sup> Due to this policy as well as the arrests of rebel military faction leaders under Aquino, the governmental conflict which characterized the Aquino presidency abated significantly.

The transitional period beginning with Marcos' departure from power and ending with the cessation of military hostility toward the government included two separate governmental approaches to transitional justice. The first was an attempt by Aquino to purge those she suspected of loyalty to Marcos from her government; the second was Ramos' granting of amnesty to rebel military faction leaders. In the interest of consolidating her power as well as moving the Philippines beyond the Marcos era and the corruption and human rights abuses which characterized it, this seemed an acceptable and even justified approach. The purge angered those she aimed to remove from power, who viewed the action as unfair and unjust. Many Filipinos sided with these officials and Aquino's political challengers, calling the attempted purge undemocratic. These factors resulted in a highly destabilized government and several attempted coups.

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<sup>43</sup> Ibid., 168.

<sup>44</sup> Ibid., 166.

<sup>45</sup> Ibid., 167.

<sup>46</sup> Ibid., 178.

<sup>47</sup> Ibid., 176.

Ramos' approach, conversely, ended the conflict between rebel military factions and the government. Many of the problems which plagued Aquino's presidency and government, particularly the instability and frequent attempts on the part of the military to force her from power, were eliminated as a result of Ramos' offer of amnesty to remaining military leaders. The Philippines consequently saw no attempts to force presidents from power for almost ten years.

Political instability returned in 2001 when President Joseph Estrada was compelled to leave office by popular protests amid widespread belief that he was concealing illegal income. Arbitrary killings and other problems, including corruption, continued under subsequent governments.<sup>48</sup> The Filipino transition cannot be called a success as it failed to restore essential Filipino civil liberties. However, many of the abuses carried out by Marcos were ended and those loyal to him were not able to exercise any notable influence in the Filipino government after 1992. The political power of the military was also neutralized significantly under Aquino and Ramos, leading to a stronger Filipino democracy. The different approaches taken by Aquino and Ramos toward pro-Marcos and rebel military factions in the Philippines, as well as the results of these approaches, are therefore illustrative.

## Germany

Like modern Korea, divided Germany was for decades characterized by sharp contrast, and a unique set of circumstances, including the absence of a domestic authoritarian leader, were addressed during reunification.

Set on a Cold War fault line, East and West Germany developed quite differently following the surrender of the Third Reich, due, as in Korea, to post-war occupational divisions and the rapid fallout between the Western allies and the Soviets. Strong executives were not part of the government of East Germany, which was, like other eastern European communist states, subject to the authority of the Soviet Union. Power in the East German government was decentralized, and therefore transition did not bring into question the fate of a dictator. The prominent secret police force (commonly known as the Stasi), which engaged in monitoring East German citizens and arbitrarily imprisoned some, was the institution of main concern in the German transition.<sup>49</sup> Following reunification was the question of how to approach the Stasi leadership as well as the secret files the members had compiled on East German citizens.

<sup>48</sup> "Philippines," Human Rights Watch, accessed July 8, 2012, <http://www.hrw.org/asia/philippines>.

<sup>49</sup> Hayner, *Unspeakable Truths*, 61.

While Stasi officials had attempted to destroy the files before a mob stormed its headquarters as part of popular democratic and reunification efforts, most remained untouched.<sup>50</sup> Many debated the proper approach for the German government regarding the files; some believed they should be destroyed to protect the privacy of their subjects and to help East Germany move past the Stasi days, while others believed the subjects had a right to their files, and even that files should be used to try Stasi officials. The files were eventually made accessible to their subjects. A truth commission was later undertaken to investigate the secret police and East German abuses of power and human rights violations, which included some public testimony and produced policy recommendations for the government.<sup>51</sup>

Amnesty was not granted to any parties; however, with few exceptions, no East German officials were ever prosecuted for human rights abuses. Though the government approach to the Stasi files and truth commission were criticized, they were successful in complementing transitional efforts and Germany is today a world democratic power which protects the rights of its citizens.<sup>52</sup>

## Romania

Allied with Germany early in World War II, Romania found itself inside the Iron Curtain along with East Germany following its conclusion. Similar to North Korea, Romania was a communist state ruled by a repressive dictator in the decades following World War II, with a decreasing standard of living, the lowest in its region by 1989. Leader Nicolae Ceausescu was tried and executed by civilians as part of transition; they faced legal obstacles in bringing lower-level officials to court, which impeded transitional justice efforts, but not the transition itself.

Ceausescu came to power in 1965 and initially pursued progressive, West-looking policies, breaking from the Soviet Union on some issues.<sup>53</sup> As time passed, he increasingly followed a trajectory similar to that of Ferdinand Marcos and Park Chung-hee, widening the scope of the government and greatly broadening the powers of the police force, diminishing the rights of the Romanian populace and causing his own popularity to fall.<sup>54</sup> He also adopted debt-reduction measures which were ultimately successful, but impoverished

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<sup>50</sup> "Stasi Museum," Stasi Museum, accessed July 8, 2012, <http://www.stasimuseum.de/en/enindex.htm>.

<sup>51</sup> Hayner, *Unspeakable Truths*, 53.

<sup>52</sup> "Germany," Human Rights Watch, accessed July 20, 2012, <http://www.hrw.org/europecentral-asia/germany>.

<sup>53</sup> Ibid.

<sup>54</sup> Jan Zielonka and Alex Pravda, ed. *Democratic Consolidation in Eastern Europe*, Volume I (Oxford: Oxford University Press, 2001), 213.

the population considerably.<sup>55</sup> Though international organizations classified Romania under Ceausescu as a highly repressed society, Ceausescu worked to mask the oppression his regime engaged in; as a result, scholars are unsure of the extent of his abuses.<sup>56</sup>

Unlike the Kim regime in North Korea, however, Ceausescu was unable to sustain his rule following the collapse of the Soviet empire and, accordingly, the simultaneous evaporation of its military support for his regime. The population rose up against Ceausescu in December 1989. Following an unsuccessful attempt to flee the capital, Ceausescu was captured, forced to stand a farce of a trial for his crimes, and executed.<sup>57</sup>

Prior to his departure, Ceausescu issued a proclamation of amnesty for most crimes committed before 1988, and limited the punishments for the most severe, such as murder.<sup>58</sup> This proclamation remains in effect and has obstructed retroactive justice. However, between 1993 and 2002 fourteen former officials—police officers, militia officers, a political prison chief and the Interior Minister were tried and convicted for exceptional crimes under prior communist regimes.<sup>59</sup>

Romanian democratic transition was largely successful. Pre-World War II political parties reappeared, market reforms were quickly instituted and long-term economic growth followed. Several democratic transfers of power have taken place since Ceausescu's removal, and the repression of political freedoms and human rights abuses common throughout most of Romania's communist history have not returned.<sup>60</sup>

## Czechoslovakia

Like Romania, Czechoslovakia was an authoritarian communist state for over four decades, but it differed from its neighbors in notable ways. Following peaceful transition, its new government was faced with the objective of ensuring that human rights violations carried out by lower-level officials under the previous communist leadership did not re-emerge.

<sup>55</sup> Ralph Blumenthal, "Upheaval in the East: Obituary; The Ceausescus: 24 Years of Fierce Repression, Isolation and Independence," *New York Times* (New York, NY), December 26, 1989: <http://www.nytimes.com/1989/12/26/obituaries/upheaval-east-obituary-ceausescu-24-years-fierce-repression-isolation.html?pagewanted=all&src=pm>.

<sup>56</sup> Raluca Ursachi and Raluca Grosescu, "Transitional Criminal Justice in Post-Communist Romania," Presentation at the Crimes of the Communist Regimes conference, Prague, February 24-26, 2010, [http://www.ustrcr.cz/data/pdf/konference/zlociny-komunismu/Raluca\\_Grosescu.pdf](http://www.ustrcr.cz/data/pdf/konference/zlociny-komunismu/Raluca_Grosescu.pdf).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> "Romania," Human Rights Watch, accessed July 8, 2012, <http://www.hrw.org/europecentral-asia/romania>.

Early in its communist history, political repression in Czechoslovakia was not as severe as it was elsewhere in Eastern Europe—in the 1960s, particularly under Alexander Dubcek, the Czechoslovakian government briefly moved away from authoritarianism and toward partial democracy and economic decentralization.<sup>61</sup> This was halted forcibly by the Soviet Union in 1969; troops were sent in to “normalize” Czechoslovakia and reverse the fledgling political transformation. Until the Velvet Revolution of 1989, the goal of the occupying Soviet Union was to prevent Czechoslovakia from sliding out of the orbit of the USSR again.<sup>62</sup> Czech leadership after 1969 lacked a strong, independent executive—as was the case in East Germany, power was less centralized and subject to Soviet authority, as demonstrated by the occupying military.<sup>63</sup>

In the midst of the ultimately successful 1989 movement for democracy, popularly known as the “Velvet Revolution”, as well as the collapse of other communist states and rapid decline of the USSR, Czech leaders decided to dismantle the longstanding communist system.<sup>64</sup> President Gustav Husak appointed non-communist leaders to fill an entirely new government and resigned shortly afterward. Democratic elections were held in 1990, and a “lustration law” was passed by the new parliament the following year.<sup>65</sup>

Similar to a purge, the “lustration law” forbade the holding of office in governmental, educational, judicial, media or state-owned corporate fields by communist collaborators of almost every sort.<sup>66</sup> Lower- and mid-level former officials, as well as members of the population having demonstrated communist sympathy, were targeted by the lustration law. In addition, a narrower resolution mandating screening of Federal Assembly employees and officers under the Prime Minister was adopted.<sup>67</sup> Efforts to exclude communist sympathizers from government were quickly established. In 1993 Czechoslovakia divided into the Czech Republic and Slovakia following a national referendum for Slovakian independence.

## Results in the Czech Republic

The original lustration law was intended to last five years; the Czech Republic has renewed it twice and it remains in effect. In addition, other laws

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<sup>61</sup> Mahoney, William M, *The History of the Czech Republic and Slovakia* (Santa Barbara: Greenwood, 2011), 208-11.

<sup>62</sup> Ibid., 216-28.

<sup>63</sup> Zielonka et al., ed., *Democratic Consolidation*, Vol. I, 320.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., 322.

<sup>67</sup> Nadya Nedelsky, “Divergent Responses to a Common Past: Transitional Justice in the Czech Republic and Slovakia,” *Theory and Society* 33, no. 1 (2004): 65-115, <http://moduly.outly.cz/posyze1/transitionaljustice.pdf>.

condemning the former communist party as a criminal organization were later passed, and several former officials were prosecuted. Presidential amnesties and statutes of limitations prevented the prosecution of many lower-level officials; trial subjects were high-level officials or those accused of crimes too severe to be exempted from trial by amnesty or a statute of limitation.<sup>68</sup>

The Czech economy grew following the Velvet Revolution and has continued ever since; the Czech Republic is now one of the premier Eastern European economic powers. Its democracy remains strong and communist influence has been effectively kept out of the government. Lustration policies have also not led to any major social unrest or civil conflict in the Czech Republic.<sup>69</sup>

### Results in Slovakia

Though initially part of Czechoslovakia and under the same lustration law, Slovak officials did not enforce it in the same capacity as their Czech counterparts prior to independence.<sup>70</sup> This approach continued following independence, and the lustration law was allowed to expire as originally planned in 1996. However, the last chief of the Czechoslovak Secret Service was tried in Bratislava and sentenced to a brief prison term in 2001.<sup>71</sup> A Department for the Documentation of Crimes committed by the communist regime was established by Slovak Minister of Justice and former religious dissident Jan Carnogursky in 1999. This institution aimed to provide legal advice to victims of communist abuse seeking restitution, though it has reportedly been slow and inefficient.<sup>72</sup>

Despite such deviation from the neighboring Czech Republic's approach to former communist officials, the Slovak economy has experienced similar growth, and Slovakia remains a peaceful democracy. Some minor problems have been reported with Slovakian human rights, including lengthy detentions prior to trial and limits on freedom of religion in some areas, and corruption remains a concern.<sup>73</sup> However, Slovakia's transition can be considered successful.

### Hungary

Another member of the Soviet bloc, Hungary has little in common with North Korea besides communist history, and the forms communism took

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.



in the two countries were quite different. However, North Korean officials have expressed interest in the Hungarian model of economic development.<sup>74</sup> Democratic transition and transitional justice in North Korea following the Hungarian model also merit consideration as they may ease transition and make it more acceptable to those now in power.

Similar to Czechoslovakia and other Soviet satellite states, Hungary resisted communist occupation and control. Like Czech prime minister Alexander Dubcek, Hungarian prime minister Imre Nagy liberalized Hungarian government and policies, though a decade earlier than Dubcek.<sup>75</sup> Fearing a Hungarian break from the Soviet bloc, Moscow intervened militarily in 1956, and the dispatched Soviet troops met with heavy, though ultimately unsuccessful, civilian resistance. Nagy was executed by the Soviets along with hundreds of other Hungarian rebels. Thousands more were imprisoned or interned.<sup>76</sup>

In 1989, popular protests against the occupying Soviets met with Soviet Premiere Mikhail Gorbachev's willingness to allow Hungary to transition from a communist economy with some free-market characteristics to a full market economy amidst a rapid Soviet decline.<sup>77</sup> Peaceful, managed democratization followed with the approval of Gorbachev as pro-democracy leaders met with government officials to bring about transition<sup>78</sup>, and in 1990 Hungary held its first free parliamentary elections in decades, along with many of its neighbors.<sup>79</sup> The Hungarian Democratic Forum, a conservative party, won the elections and reform was adopted slowly. The Hungarian Socialist Party, made up of former communists, won the 1994 elections; progress in human rights as well as economic and democratic liberalization was not hampered by their control.<sup>80</sup>

Following democratization, the Hungarian government was unable to prosecute past human rights violators due to the repeated declaration of such actions as unconstitutional by the Constitutional Court. The Court made most of the final decisions on the permissibility of retroactive justice and lustration laws, declaring both unconstitutional.<sup>81</sup> Though the passage of a law defining

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<sup>74</sup> Bradley K. Martin, *Under the Loving Care of the Fatherly Leader: North Korea and the Kim Dynasty* (New York: St. Martin's Press, 2006), 667.

<sup>75</sup> Bela K. Kiraly, *Basic History of Modern Hungary, 1867-1999* (Malabar: Kireger Publishing Company, 2001), 73.

<sup>76</sup> Ibid., 74-9.

<sup>77</sup> Zielonka et al., ed., *Democratic Consolidation*, Vol. I, 408.

<sup>78</sup> Ibid., 411.

<sup>79</sup> Ibid., 413.

<sup>80</sup> Zielonka et al., ed., *Democratic Consolidation*, Vol. II, 291-2, 4-5.

<sup>81</sup> Sarah Benavides Ambrocio, "Time and Politics: Transitional Justice in Hungary and Spain" (masters thesis, Central European University, 2011), accessed June 22, 2011, [http://www.etd.ceu.hu/2011/benavides\\_sara.pdf](http://www.etd.ceu.hu/2011/benavides_sara.pdf).

crimes committed by the Soviets in 1956 as crimes against humanity was upheld, only two former officials were ever tried as a result.<sup>82</sup> Despite such reluctance to pursue judicial action against former communist officials or limit their participation in a post-communist society, Hungary's transition was very successful, and post-transitional liberalization has also been successful.<sup>83</sup>

### **Tabulating Case Study Data**

Per Grodsky's method, referenced above, seven general categories will be used to label post-transitional government responses to previous abuses, beginning with the most lenient approach, cessation and codification of human rights violations, and ending with the most harsh, criminal prosecution of those highest on the chain-of-command.<sup>84</sup> The categories are as follows:

1. Cessation and codification of human rights violations
2. Rebuke of old system
3. Rehabilitation and compensation for victims
4. Creation of a truth commission
5. Purging human rights abusers from public function
6. Criminal prosecution of "executors" (those lower on the chain-of-command)
7. Criminal prosecution of "commanders" (those higher on the chain-of-command)

The approaches taken in the cases examined above fall into many of these categories, and most of the post-transitional governments adopted policies which invoked multiple approaches, such as ceasing and codifying violations, rebuking the old system, purging human rights abusers from public function and prosecuting lower- and higher-level officials, which was the approach taken in Japan. Severe approaches (those being classified as five, six or seven by Grodsky's method) are often supplemented by more lenient tactics—for example, a new government putting a former dictator on trial may also provide rehabilitation and compensation for citizens abused under the dictator's regime. Case studies show this to be helpful and effective; accordingly, those participating in North Korean transition should consider using several of the lenient approaches to end human rights violations, label such violations as wrong and unacceptable, and aid the victims of imprisonment and torture.

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<sup>82</sup> Ibid.

<sup>83</sup> Zielonka et al., *Democratic Consolidation*, Vol. II, 291-2, 4-5.

<sup>84</sup> Grodsky, *The Costs of Justice*, 38.

However, use of one of the harsher approaches does not necessitate use of others—for example, Roh Tae-woo and Chun Doo-hwan, two former leaders, were tried and convicted in South Korea for ordering the violent repression of a student protest, but, with a handful of exceptions, no action was taken against lower-level officials, nor was a purge instated. Rarely are both lower- and higher-level officials prosecuted systematically for past human rights violations because such an approach carries greater risk of stalling transition or destabilizing the new government, in addition to being difficult and costly.<sup>85</sup> Therefore, post-transitional governments taking category seven approaches do not usually take approaches fitting into category five or six, though category one through four approaches may be invoked along with the more severe action.

Following is a set of tables. Table 1 contains the values assigned to the approaches of the post-transitional governments examined in this essay, corresponding to the categories listed above. The value listed represents the most severe action taken by the respective government—more lenient approaches (those in categories 1-4) may also have been taken in each case. As noted in the preceding paragraph, governments often use only one of the harsher approaches (those in categories 5-7); multiple values indicate that a government used more than one of these approaches. Values of five or six represent systematic action against lower-level officials, while trial of just one higher-level official (a national leader or one working directly under a national leader) qualifies as a category seven response. In addition, the outcome (successful or unsuccessful) of each transition is listed. Table 2 lists the number of cases in which each approach was used and the number of successful resulting outcomes.

**Table 1**

<b>Case</b>	S. Korea (1960)	S. Korea (Post-'87)	Japan	Philippines (Aquino)
<b>Approach</b>	5	7	5, 6, 7	5
<b>Outcome</b>	Unsuccessful	Successful	Successful	Unsuccessful

Philippines (Ramos)	Germany	Romania	Czechoslovakia/ Czech Republic	Slovakia	Hungary
2	4	7	5, 7	3	2
Unsuccessful	Successful	Successful	Successful	Successful	Successful

**Table 2**

<b>Approach</b>	<b>Successful Instances</b>
7	3 of 3 cases
5, 6, 7	Successful in only case used
5, 7	Successful in only case used
5	1 of 3 cases
4	Successful in only case used
3	Successful in only case used
2	1 of 2 cases

### **Analysis of Case Study Data**

Many of the approaches have led to success; however, the most effective option in terms of prior usage and resulting success is approach 7, as outlined by Grodsky. Trial, and possibly conviction, of top leaders is an ideal option for transitional or post-transitional states for several reasons. First, trial of a leader who allowed or encouraged governmental violations of human rights holds that leader accountable for such crimes. Second, such a trial sets a national precedent for future human rights action, and, similarly, serves as a warning to post-transitional leaders that they will, too, be prosecuted if they follow the path of their predecessors. Third, such action does not greatly interfere with transition; if lower-level officials are not tried along with higher-level officials, the state is more likely to remain stable and experience a successful transition. This is evidenced by the failed transitions of post-Rhee South Korea and the Philippines under Aquino.

In the interest of protecting human rights and fostering democratization, would selective prosecution of higher-level officials be an effective approach in North Korea following Korean reunification? If so, which leaders should face judicial action, and should amnesty be explicitly granted to others?

### **North Korean Transition: Objectives and Difficulties**

Within the past few decades, scholars, analysts and politicians alike have speculated, on multiple occasions, that collapse of the reclusive Democratic People's Republic of Korea (DPRK, or North Korea) was imminent. While they were mistaken each time, the DPRK remains weak and reunification under the present South Korean government is a possibility. As different as North Korea is from South Korea, the leaders and citizens of both share a common identity, (pre-Cold War) history and a fundamental desire to see their nation reunited.

Given the current state of affairs, such reunification seems most likely to come about as a consolidation of the Peninsula under the government in Seoul following North Korean collapse, and for the purpose of simplicity, this essay assumes such a scenario. Kim Jong-un's rise to power was a delicately managed affair.<sup>86</sup> Jong-un had much less time than his father to prepare to assume the role, and had not always been Jong-il's favored successor.<sup>87</sup> Clearly, the KWP has doubts about Jong-un, and his inexperience may further weaken North Korea by perpetuating these doubts and causing power struggles within the KWP.

Governmental collapse is more plausible with Jong-un in power, and it has worked to counter this fact. Top North Korean leaders realize that they cannot remain in power without reviving the economy and achieving better food security in their country. As a result, Jong-un and Jang Sung-taek, one of the other top DPRK officials, have recently met with Chinese leaders to discuss further opening North Korea's market to Chinese investment and developing special economic zones to improve the DPRK's economic situation.<sup>88</sup> Conversely, North Korea continues to threaten its neighbors, attempting to appear strong, likely to mask the actual weakness of its government and stave off feared international action in response to its human rights situation. North Korea's recent rocket launch<sup>89</sup>, as well as previous attempts to launch rockets, attacks on disputed territories and sinking of the Cheonan in 2010, are examples of these attempts.<sup>90</sup>

This change would raise many issues, including the question of how to approach the government in Pyongyang, its egregious human rights record and its suppression of many basic civil liberties.<sup>91</sup> While members of the North Korean government have committed terrible atrocities and would require attention, reunification of such different worlds would be very challenging, and a fast, effective transition would be crucial in ensuring successful reunification.

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<sup>86</sup> Jean H. Lee, Sam Kim and Foster Klug, Associated Press, "North Korea Rally: Tens of Thousands Pledge Loyalty to Kim Jong Un," *Huffington Post* (Washington, DC), January 3, 2012, accessed August 13, 2012, [http://www.huffingtonpost.com/2012/01/03/north-korea-rally-kim-jong-un\\_n\\_1181595.html](http://www.huffingtonpost.com/2012/01/03/north-korea-rally-kim-jong-un_n_1181595.html).

<sup>87</sup> Martin, *Under the Loving Care*, ch. 37.

<sup>88</sup> Kornelius Purba, "China's Flagging Economic Aid to North Korea," *Jakarta Post* (Jakarta), August 24, 2012, accessed December 18, 2012, <http://www.thejakartapost.com/news/2012/08/24/china-s-flagging-economic-aid-north-korea.html>.

<sup>89</sup> "North Korea Defies Warnings in Rocket Launch Success," *BBC News* (London), December 12, 2012, Accessed December 18, 2012, <http://www.bbc.co.uk/news/world-asia-20690338>.

<sup>90</sup> "Seoul, Pyongyang Urged To Reduce Tension Through Dialogue," *North Korea Newsletter*, no. 208 (2012): <http://english.yonhapnews.co.kr/northkorea/2012/05/03/91/0401000000AEN2012503000700325F.HTML>.

<sup>91</sup> "North Korea," Human Rights Watch, accessed July 8, 2012, <http://www.hrw.org/nkorea>.

Amnesty for some North Korean officials would likely facilitate such a transition by raising support for a new government among North Koreans and providing for the best administration of the Northern Provinces of the new Korea. With such interests in mind, how should South Korea and the international community approach the question of amnesty for North Korean officials?

The short-term objectives of South Korea and any nations assisting her following reunification will be to transform the area north of the present DMZ into an area in which democracy and capitalism are allowed to take root and the Seoul government and its institutions are recognized, as well as where human rights violations no longer occur. Later, a large-scale overhaul of infrastructure as well as continuing (and strengthened) measures to foster economic development will be necessary. This segment will examine how selective justice and amnesty for North Korean leaders can best be applied in the pursuit of these objectives.

### **Democracy and Capitalism under the Seoul Government**

Dramatic changes in North Korean society would follow reunification. One of the primary objectives of reunification efforts should be to minimize the immediate shocks to those living north of the DMZ. North Korean democratic institutions should be established relatively soon after reunification, but the immediate goal of reunification in this regard should be limited to gaining popular recognition of the Seoul government as the one legitimate Korean national government. Such an approach would serve to minimize both upheaval and unrest in North Korea, which would be counterproductive to the later development of democracy and capitalism.

Support from the North Korean elite, which logically holds favorable views of Kim Jong-un and the communist government, will be crucial in attaining this objective. While most North Koreans live in extreme poverty, the government has given power to some, and many in power have become wealthy.<sup>92</sup> Reunification under the Seoul government may be welcomed by the average North Korean, who fits into the former category, but those within the latter would almost certainly react negatively to such change, fearing loss of their power (limited as it may be) and wealth, as well as judicial action.

Past democratic transitions have shown that, as much as possible, new governments must avoid provoking the elite into resisting governmental

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<sup>92</sup> Ezra Klein, "The Dark Legacy of North Korea's Ruling Elite," *Japan Times* (Tokyo), December 22, 2011: <http://www.japantimes.co.jp/text/ea20111222a3.html>.

change, as such a reaction can cripple or prevent transition.<sup>93</sup> Similarly, amnesty for political elites helps them to be more receptive to such change as they will not fear prosecution for any past crimes or cooperation with the former government. This was shown to be the case in the Philippines, as Ramos' offer of amnesty quelled the fierce opposition of military leaders to the new government there. Given the presence of an elite in North Korea, amnesty should be considered as a policy option to facilitate recognition of the Seoul government in North Korea.

### Human Rights

The North Korean government commits grave human rights violations in efforts to maintain its power and large scope, and those will need to be halted following transition. Among other abuses, the North Korean government maintains prison camps for those it determines to be criminals or "anti-socialists."<sup>94</sup> International estimates believe 200,000 state-declared criminals to be detained in these camps, in which conditions are terrible, torture is commonplace and deaths are frequent.<sup>95</sup> Following reunification, the ROK should immediately stop the torture of prisoners and aid them. Liberation should follow soon after. In addition, other state abuses of power will need to be halted as soon as possible.

One great challenge post-transitional governments face is ensuring that the human rights abuses committed under previous leadership are not repeated. While North Korea is a third-world society with a long history of human rights abuses, the transition from Pyongyang governance to Seoul leadership would quickly result in substantial improvement in North Korean human rights as South Korea has maintained a good record following Roh Tae-woo's electoral defeat in 1992.<sup>96</sup> A successful transition would likely prevent any future major or systematic human rights violations in North Korea as South Korean human rights standards would be automatically imposed on the North.

In addition to trial of higher-level officials, should South Korea take other action to aid transition from DPRK governance and human rights violations? Government reparations to victims and official apologies for past human rights infractions would be helpful. Inquiries into abuses would also be welcome, though perhaps after a successful transition has been completed. Trials and punishment for lower-level North Korean officials, however, could undermine the transition by taking resources and public attention from it, while

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<sup>93</sup> Grodsky, *The Costs of Justice*, 53-6.

<sup>94</sup> "North Korea."

<sup>95</sup> Ibid.

<sup>96</sup> Cumings, *Korea's Place*, 391.

risking retribution from the North Korean elite and alienating other North Koreans. Furthermore, while many North Koreans likely do not believe much of what their current government tells them, they may be wary of international influence, particularly from Japan and the US, in human rights trials.<sup>97</sup> The prominence of anti-imperialist, American and Japanese themes in North Korean “Juche” ideology, as well as the level of exposure of North Koreans to these themes, suggest such a possibility.<sup>98</sup>

### Post-Transitional Long-Term Development

History, including that of Korea, shows that one of the major problems with governmental transition, particularly transition with international forces at play (colonialism, post-colonialism and sometimes unification), is the issue of national and local administration.<sup>99</sup> One of the impediments for Syngman Rhee in post-World War II South Korea was the presence of former Japanese collaborators in his administration.<sup>100</sup> This was a cause for Southern dislike and Northern distrust of Rhee. Though Rhee had spent decades condemning Japanese colonial rule of the Korean peninsula, he had little choice but to keep Japanese collaborators in his government following independence because of their governmental experience and expertise<sup>101</sup>, though shared anti-communist views also played a major role. American Major General John Hodges advocated the same approach following Japanese surrender, believing that, in the interest of stability, the US and South Korea had no choice but to keep the collaborators in power.<sup>102</sup>

Today, those outside North Korea have limited knowledge of what goes on inside due to the nature and regulations of its regime. Many conclusions can be made on matters regarding the economy and human rights, but little is known about its infrastructure and technical policies. Logically, those best suited to manage such North Korean affairs, particularly in low, technical levels of government, are those presently in those positions, as their knowledge and experience in those positions are unrivaled. A wide cleaning of the lower- and mid- levels of the house, so to speak, would hamper transition efforts by necessitating training and familiarization of new, less experienced officials

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<sup>97</sup> Dr. Mitchell Lerner (Ohio State University Professor) in discussion with the author, July 4, 2012.

<sup>98</sup> J.E. Hoare and Susan Pares, *North Korea in the 21<sup>st</sup> Century: An Interpretive Guide* (Kent: Global Oriental Limited, 2005), 6-9, 34-6.

<sup>99</sup> Guy Podoler, *Monuments, Memory, and Identity: Constructing the Colonial Past in South Korea* (Bern: Peter Lang, 2011), 103.

<sup>100</sup> Man-gil Kang, *A History of Contemporary Korea*, Trans. John B. Duncan (Kent: Global Oriental Ltd., 2005), 187.

<sup>101</sup> Podoler, *Monuments, Memory and Identity*, 103-4.

<sup>102</sup> Lerner, in discussion with the author.



in these matters. Though many lower-level officials engage in human rights violations, their actions are likely conducted under considerable pressure from the North Korean leadership. Most North Korean civilians suspected of anti-socialist activity are imprisoned, often along with the three proceeding generations of their families.<sup>103</sup> Refusal by an official to carry out senior orders probably risks similar, or worse, punishment. Therefore, they are not as culpable in systematic human rights abuses and amnesty should be considered.

Those now in technical administrative positions likely hold somewhat more positive views of the Kim regime than the average North Korean, but their removal from government may anger them and foster their resistance to transition. Furthermore, North Korean officials are at least somewhat open to new governing methods. Though they have been commanded by the Kim family or their subordinates, many (including the Kims) have studied and support other, more successful models for development, including the Hungarian model, as noted above.<sup>104</sup> Amnesty and retention of mid- and lower-level administrative officials is likely to result in their cooperation and thereby smooth transition, while institution of an entirely new administration will, at least initially, hamper such efforts.

### **Popular Sentiment and the Question of Amnesty**

It is very difficult to draw definitive conclusions about popular political sentiment in North Korea due to the tightly-closed nature of the country and the domestic measures in place which do not allow free speech. Given the volume and experiences of North Korean defectors, a consensus exists in scholarship that, despite the efforts of the government and the spectacles of support for the Kim family performed by North Koreans, many do not hold favorable views of their leaders.<sup>105</sup>

However, this is not true of all defectors. Some, though frustrated enough with life in the North to escape, are trapped in a pro-Kim mindset due to the level of political indoctrination which takes place beyond the DMZ.<sup>106</sup> There may well be considerable factions of North Koreans who staunchly support Kim Jong-un and would object, possibly violently, to judicial action against him. Grodsky writes that,

Even the world's most brutal dictators seem capable of inspiring immense emotional solidarity in their former

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<sup>103</sup> N.C. Heiken, *Kimjongilia*, Documentary (2009).

<sup>104</sup> Martin, *Under the Loving Care*, 667.

<sup>105</sup> Ibid.

<sup>106</sup> Mikyoung Kim, *Securitization of Human Rights: North Korean Refugees in East Asia* (Santa Barbara: Praeger, 2012), 16-36.

subjects. The powerful reaction to Joseph Stalin's death, with his funeral drawing tens of thousands of mourners, illustrates this fact. Fifty years afterward, a retiree who attended Stalin's funeral recalled, 'It was as if we lost the father of the family, the person who took care of us. We felt like orphans.'<sup>107</sup>

This anecdote parallels eerily with Kim Il-sung's and, more recently, Jong-il's funerals.

Despite the support for Kim encouraged (and required) by the North Korean government, some scholars wonder if the Kim family really holds complete power.<sup>108</sup> It is well-known that the Korean Workers' Party (KWP) has a considerable role in the governing process, and advisers of the Kim leaders have, of course, been prominent KWP members. Two of these officials, Jang Sung-taek and Kim Kyong-hui, have held positions of great power in the Kim governments, particularly since Jong-un assumed command in late 2011 due to his inexperience.<sup>109</sup> High-ranking members of the KWP and relatives of Jong-il and Jong-un, Jang and Kim have exerted considerable influence in North Korea for decades.<sup>110</sup> The extent of such influence is impossible to determine given the nature of the North Korean government, but with their positions, the two may be responsible for many of the Kim government's policies, including those which arbitrarily arrest and imprison North Koreans.

### Issues with the North Korean Judiciary

Compounding the issue of transitional justice in North Korea is the nature of the longstanding judicial system. Its views of legal transgressions and appropriate justice for such transgressions are quite misguided as it acts as a vehicle for the enforcement of decrees of the Kim family and KWP.<sup>111</sup> Severe prosecution of acts labeled treasonous seems to be the main focus of the judicial system, and as the Kim family has great influence on the appointment of jurors, it can be assumed that they are loyal to the Kim family.

The absence of a judicial system capable of conducting trials for past human rights violators, whether due to lack of resources or of fair jurors,

<sup>107</sup> Grodsky, 55, citing Steve Rosenberg, "Shades of Spring on Stalin's Legacy," *BBC News*, March 5, 2003.

<sup>108</sup> Lerner, in discussion with the author.

<sup>109</sup> Mure Dickie, "Chef Offers New Tidbit on North Korean Leader," *Financial Times* (London), December 7, 2012, Accessed December 10, 2012, [http://www.washingtonpost.com/world/asia\\_pacific/chef-offers-new-tidbit-on-n-korean-leader/2012/12/06/77040f42-3fce-11e2-a2d9-822f58ac9fd5\\_story.html](http://www.washingtonpost.com/world/asia_pacific/chef-offers-new-tidbit-on-n-korean-leader/2012/12/06/77040f42-3fce-11e2-a2d9-822f58ac9fd5_story.html). The likely role of Jang (spelled 'Chang') is highlighted.

<sup>110</sup> Lerner, in discussion with the author.

<sup>111</sup> "World Report 2012: North Korea," Human Rights Watch, accessed April 21, 2012, <http://www.hrw.org/world-report-2012/world-report-2012-north-korea>.

makes successful domestic trial and conviction of violators very unlikely. On the contrary, such domestic trials might reverse transitional efforts, affirming violations as legally acceptable by declaring violators innocent and permitting them to remain in power.

International tribunals, the alternative to domestic trials, would be without these flaws, and would discourage future human rights violations by trying and (likely) punishing offenders; however, such tribunals may also be counterproductive to transition efforts. Retrospective inquiries into human rights violations by non-domestic judicial bodies with the intent of punishing offenders would not only destroy any support among the elite for transition, as noted above, but would also risk alienating popular support.<sup>112</sup> As shocks to North Korean society should be minimized in the wake of reunification, the early imposition of international jurors and judicial systems on transitional North Korea should be avoided as it would be unwelcome and serve to further complicate a difficult undertaking.

### **Case Studies Most Similar to North Korea**

Correct application of past transitional justice approaches in North Korea requires anticipation of key factors in North Korean transition, and special consideration of cases where these factors have been most prominent. On the basis of pre-transitional conditions, South Korea is the most similar to North Korea. Shared peninsular history, noted above, should be a significant factor in consideration of post-unification policy options.

The cases of North Korea and Japan are less similar, but a vital aspect of North Korean society was also present in World War II-era Japan. As noted above, the Kim family is revered on a divine scale by some North Koreans, as Emperor Hirohito was before Japan's surrender. This must be kept in mind when addressing the question of amnesty for North Korean officials. The incredible success of the decision to grant Emperor Hirohito amnesty merits possible inclusion in any proposed solution.

In addition, pre-transitional Romania bears significant similarities to North Korea. Both were communist societies farther distanced from Soviet control than some of their counterparts (such as Czechoslovakia), and both were ruled by dictators who engaged in systematic human rights abuses, including the use of prison camps (though the North Korean camps are much more notorious).

### **Cases Less Similar to North Korea**

While the subject states of each of the case studies were chosen for their similarities with North Korea, naturally, some are more similar to North

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<sup>112</sup> Grodsky, *The Costs of Justice*, 19-28.

Korea than others. This applies particularly to many of the Eastern European post-communist states examined above as they are rooted in European and Western Asian, rather than East Asian, tradition and often were under subtly, but notably, different forms of government than North Korea.

Czechoslovakia and Hungary differed from North Korea in many respects, most importantly in the nature of their relationships with the Soviet Union. Both were much more adverse to communist ideas. Government officials and civilians alike resisted many such ideas and Soviet directives. Such resistance resulted in much greater and more direct Soviet control of both. Unlike in North Korea or Romania, vast numbers of Soviet troops were sent into Hungary and Czechoslovakia to curtail popular anti-communist sentiment, which manifest itself in revolt. In addition, Moscow itself chose Czechoslovakian leaders.

As a result, communist ideas, autocratic governments, violence and human rights violations were associated more with international forces than with domestic leaders in Czechoslovakia and Hungary. The reactions of the Czech and Hungarian peoples to Soviet political and military influence support such an argument. This fundamental difference explains the differences in Czech, Slovak and Hungarian transitional justice approaches from those of Romania, Japan and post-1987 South Korea. Those ultimately responsible for human rights violations were not national politicians but rather policymakers in the Kremlin. Therefore following democratization it was logical to take action against seemingly traitorous, lower-level domestic collaborators rather than attempt to prosecute former officials in Moscow (which would not have been feasible anyway).

### **Authoritarian Leaders and Transitional Justice**

The prominent common element in pre-transitional societies most similar to North Korea has been the presence of a domestically-based authoritarian leader. Such leaders were present in each of the cases categorized “most similar to North Korea” above, as well as in the Philippines.

Following are two tables, tables 3 and 4, which contain data extrapolated from tables 1 and 2 corresponding to countries with strong, domestically-based dictators prior to transition. This is a crucial factor in North Korea today; therefore, these cases merit separate consideration.

**Table 3**

Case	S. Korea (1960)	S. Korea (Post-'87)	Japan
Approach	5	7	5, 6, 7
Outcome	Unsuccessful	Successful	Successful

Philippines (Aquino)	Philippines (Ramos)	Romania
5	2	7
Unsuccessful	Unsuccessful	Successful

**Table 4**

Approach	Successful Instances
7	2 of 2 cases
5, 6, 7	Successful in only case used
5	0 of 2 cases
2	Unsuccessful in only case used

According to the case studies, approach 7 is the most effective in facilitating transition. In societies with strong dictators prior to transition, like North Korea, this is particularly the case—trial of commanders has been necessary for successful transition in each of the most applicable cases (South Korea, Japan and Romania). Therefore, the best approach for Korea and the international community in the event of peninsular reunification would be to place former top North Korean officials on trial and grant amnesty to lower-level officials in its government.

**Further Considerations**

No society in the modern world has had a populace exposed to the amount of political indoctrination and brainwashing that the North Koreans have experienced.<sup>113</sup> Furthermore, the leaders in North Korea have been in power longer than those in almost any other state, and its remarkable isolation has facilitated these realities, making comparison to other cases difficult. The experience of Japan and the approach taken there, though of different circumstances and a different historical period, require attention due to the similarities between the nature of the Emperor’s command before and during World War II and that of the Kim family since.

An ideal general approach (judicial action against higher-level North Korean officials) also requires effective implementation. Trials can take any of three broad forms: by civilians, national judicial officials, or an international tribunal. Combinations of elements of each have been used in other cases: the jury is sometimes composed of national, as well as international, representatives.

The nature of the leadership of Kim Jong-un and his predecessors would

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<sup>113</sup> Lerner, discussion with the author.

likely make trial by international tribunal difficult. One alternative, trying of officials by a jury composed of both domestic and international officials, has been problematic in many countries, notably Cambodia.<sup>114</sup> As a result of the nature of North Korean society under Kim's rule, international influence in a transition should be kept to a minimum in order to maintain public support. Therefore, only domestic factions should try higher-level North Korean officials.

The problems noted above will, however, make effective trial of higher-level officials by the North Korean judiciary impossible. Without any knowledge of international human rights standards or personal experience with North Korean prison camps, domestic judicial officials will have a skewed view of North Korean officials. Their close political relationships to Kim Jong-un and members of the KWP will render them incapable of bringing justice to the officials.

### Conclusions

Historical analysis, particularly of cases most similar to North Korea, suggests trial of higher-level officials by North Korean civilians would be the most effective approach in halting human rights violations and instituting democracy north of the present DMZ through recognition of the government. In order to hold North Korean officials accountable for their human rights violations and end such abuses on the Korean Peninsula while pursuing a successful transition, Jang Sung-taek and Kim Kyong-hui, the high-ranking members of the KWP presumed by some to be controlling North Korea from behind the scenes, should face trial for their crimes. Amnesty for Kim Jong-un, possibly in exchange for his support of transition, should be considered due to the place of his family in North Korean culture. He is also not fully responsible for the transgressions committed since the death of his father, as he may not hold as much power as Jang Sung-taek, Kim Kyong-hui and other KWP officials, though they have called for North Korea to rally around him.<sup>115</sup>

The ROK government should be the only one involved in dictating transitional justice in North Korea. Involvement of other nations (particularly the US) in the process would be counterproductive due to widespread North Korean sentiment. The interests of other nations may also negatively affect transitional justice proceedings, as some would be wary of the establishment of international legal precedents that could one day affect them. Furthermore, other characteristics of international tribunals, particularly the possibility of more widespread prosecution of officials, as well as harsher consequences for those determined guilty, would be disadvantageous in the case of North Korea.

<sup>114</sup> Elisa Hoven, "The Khmer Rouge Tribunal."

<sup>115</sup> Ibid.

Accordingly, Jang Sung-taek and Kim Kyong-hui should be tried by a court of North Korean citizens, who experienced life under the former regime and are unaffiliated with the former judiciary, possibly a few years after transition. Like the trials of Roh Tae-woo and Chun Doo-hwan in South Korea, such action will allow national focus to stay on transition. Furthermore, it will give North Koreans time to become accustomed to democratic society and familiar with international human rights standards and laws. This will enable a more effective trial of Jang Sung-taek and Kim Kyong-hui. Laws defining and forbidding future abuses would complement transitional justice. When feasible, reparations for victims and eventually a truth commission should be considered to help North Korea move beyond its repressive history. These have been shown to contribute positively to other post-transitional societies.<sup>116</sup>

Preservation of a national unifying figure, like the emperor in Japan, should be considered to facilitate popular support for unification under Seoul leadership, which will be necessary for a successful transition. The most obvious choice is Kim Il-sung, the “eternal president” of North Korea. Though revered by many North Koreans, on a level unmatched by his son or grandson, Kim Il-sung would, of course, be unable to exert counter-progressive influence on a new Korea. Maintaining Kim Il-sung’s prominence in North Korea, even to a lesser degree, would also show international respect for North Korean society and its eternal president, which North Korea has long desired.<sup>117</sup> Retention of Kim Jong-un should also be an option, though he should be given as little power as possible.

In the interest of successful transition, blanket amnesty should be granted to lower-level North Korean officials, and they should be retained in their positions. Case studies support this approach, even in Hungary where former communists regained national control. The necessarily limited nature of international influence following transition also makes amnesty for lower-level officials ideal.

The case of North Korea is unique and complex, and any transitional justice approach to human rights violations by North Korean leaders must take into account and reflect such complexity. Though North Korea is like no other society in history, prosecution of higher-level officials has been successful in other unique societies. One can only hope that someday the lessons learned from successful application of transitional justice in North Korea will aid transitional efforts elsewhere in the world.

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<sup>116</sup> Hayner, *Unspeakable Truths*.

<sup>117</sup> Barry Keenan (Denison University Professor), in discussion with the author, June 7, 2012.

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